Supreme Court, U.S.
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No. 93-1797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Petitioners,

v.

MORTON INTERNATIONAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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REPLY BRIEF IN SUPPORT OF PETITION

M. ELIZABETH MEDAGLIA
JAMES T. SCHALLER
ROBERT N. KELLY
NICHOLAS P. JELLINS
JACKSON & CAMPBELL
1120 20th Street, N.W.
Suite 300 South
Washington, DC 20036
(202) 457-1600

Attorneys for Petitioner American Home Assurance Company

WILLIAM T. COLEMAN, JR.
Counsel of Record
JOHN L. ALTIERI, JR.
DONALD T. BLISS
PAUL R. KOEPFF
CARL R. SCHENKER, JR.
O'MELVENY & MYERS
555 13th Street, N.W.
Suite 500 West
Washington, DC 20004
(202) 383-5325

Attorneys for Petitioner Insurance Company of North America

June 16, 1994

[Counsel for additional petitioners listed on inside front cover.]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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JAMES KIRK PERRIN
DANIEL P. CASWELL
TERESA ROONEY WILLIAMS
HASKELL & PERRIN
200 West Adams Street
Suite 2600
Chicago, IL 60606
(312) 781-9393

Attorneys for Petitioner
Continental Casualty
Company

JOHN G. ROBERTS, JR.
HOGAN & HARTSON, L.L.P.
Columbia Square Building
555 13th Street, N.W.
13th Floor West Tower
Washington, DC 20004
(202) 637-5810

Attorney for Petitioner
First State Insurance
Company

ELLIOTT ABRUTYN
MORGAN, MELHUISH, MONAGHAN,
ARVIDSON, ABRUTYN & LISOWSKI
651 W. Mount Pleasant Avenue
Livingston, NJ 07039
(201) 994-2500

Attorney for Petitioner
General Accident Insurance
Company of America

JOHN C. SULLIVAN
MANTA AND WELGE
101 Carnegie Center
Suite 215
P.O. Box 5306
Princeton, NJ 08543
(609) 452-8833

Attorney for Petitioner
Liberty Mutual Insurance
Company

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners hereby reply to the opposition filed by respondent Morton International, Inc. ("Morton").[1] In the main, Morton does not dispute petitioners' showings that this case is of great importance to industries depending on regulatory approvals, including the insurance industry, and that other courts throughout the country are being urged to follow New Jersey. Instead, Morton seeks to avoid a grant of certiorari by arguing that petitioners received due process below. This assertion has no basis in fact. Equitable estoppel was not at issue at the trial level, was never raised at the intermediate appellate level, and was absent from the briefs and arguments presented before the New Jersey supreme court. Indeed, equitable-estoppel issues were interjected into the case *sua sponte* by the supreme court only after any opportunity for the insurers to present evidence addressing those issues had passed. Due process requires that, after the supreme court belatedly interjected the equitable-estoppel theory into the case, petitioners have an opportunity to show that the facts do not support an equitable estoppel.

I. CONTRARY TO MORTON'S ASSERTIONS, THE DECISION BELOW WAS PREDICATED UPON THE TRADITIONAL DOCTRINE OF EQUITABLE ESTOPPEL.

Morton's effort to defend the process in this case depends in large part on a false characterization of the holding below. According to Morton, the decision below did not turn on the "various elements" of the traditional doc-

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[1] As used herein, "Pet." refers to the petition, and "Pet. App." to the accompanying appendix (dated May 11, 1994). "Opp." refers to Morton's opposition, and "Opp. App." to Morton's appendix (dated June 10, 1994). "London Br." refers to the brief of Underwriters at Lloyd's, London, Certain Subscribing London Market Insurance Companies, and Affiliated FM Insurance Company (dated May 27, 1994); and "IELA Br." refers to the *amicus* brief filed by *amicus*-movant Insurance Environmental Litigation Association (dated June 13, 1994).

trine of " 'equitable' estoppel"—misrepresentation, reasonable reliance, and detriment. (Opp. 9.) Rather, says Morton, the decision below is "predicated upon" a novel "concept of 'regulatory' estoppel," a concept which supposedly focuses exclusively on the "representations" made to state insurance regulators in 1970-71. (*Id.*) This position cannot be squared with the decision below.

The New Jersey supreme court expressly predicated its decision upon the traditional doctrine of equitable estoppel, as previously enunciated in *Harr v. Allstate Ins. Co.*, 255 A.2d 208 (N.J. 1969). (*See* Pet. App. 88a-90a; Pet. 8-9.) *Harr* set forth, and the decision below adopted, the three well-established elements of an equitable estoppel—misrepresentation, reasonable reliance, and detriment. (*See* Pet. App. 89a-90a; Pet. 8-9.) The court below stated expressly that it was extending *Harr* into the regulatory context, not that it was announcing a novel "regulatory estoppel" theory that eliminated the traditional prerequisites for imposition of an equitable estoppel. (Pet. App. 90a.) The supreme court then proceeded explicitly to make *de novo* factual determinations, summarily and on the basis of non-evidential materials, concerning those prerequisites. (*See* Pet. 8-9, 24-29.)

The intensely factual nature of the equitable-estoppel theory on which the supreme court relied is central to petitioners' due process claim.[2] By rejecting the ambiguity arguments of Morton and its *amici* (and the *Broadwell* case on which they relied) but nonetheless adopting *sua sponte* an equitable-estoppel theory, the Supreme Court of New Jersey made its decision turn on three *factual inquiries* necessarily going beyond the face of the 1970-71 representations made to the state regulators by the IRB/

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[2] This is not to say that petitioners ask this Court to resolve the underlying factual disputes. The question before this Court is whether the court below denied petitioners due process by denying notice and an opportunity to be heard concerning the dispositive factual issues.

MIRB—(1) whether those representations constituted misrepresentations in view of the real-world circumstances then existing, (2) whether New Jersey's expert regulators were somehow misled concerning the "plain meaning" of the proposed clause by reliance on any IRB/MIRB misrepresentations, and (3) whether the absence of an exclusion-triggered rate reduction constituted the detriment requisite to imposition of an equitable estoppel. (*See* Pet. 8-9, 23-29.) Petitioners' showing concerning the fundamentally unfair nature of the process by which the supreme court summarily resolved those factual questions, all of which are sharply disputed, stands wholly unrebutted.

To illustrate, the supreme court considered the alleged detriment of the absence of an exclusion-triggered rate decrease to be so important to its holding that the opinion returns to that topic at least four separate times. (*See* Pet. App. 35a-36a, 42a-46a, 87a-90a, 94a-95a.) Morton does not even attempt to show any basis whatever for the supreme court's *de novo* determination that a rate reduction would have been "inescapable" had 1970 regulators understood the pollution-exclusion clause. (Pet. App. 86a-87a; *see* Pet. 28-29.) By falsely denying that this issue was relevant to the decision below, Morton tacitly concedes its complete inability to defend the process by which the issue was resolved.[3]

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[3] Likewise, Morton shows no basis for the supreme court's *de novo* conclusion that New Jersey's expert regulators (or those of any other state) failed to understand the "plain meaning" of the pollution-exclusion clause in 1970 due to the single supposedly misleading paragraph in the IRB/MIRB Explanatory Memorandum. (Pet. App. 86a-87a; *see* Pet. 26-27.) Instead, Morton asserts that principles of New Jersey administrative law preclude inquiry into the mental processes of the New Jersey regulators. (*See* Opp. 16-17.) Notably, the supreme court did not invoke such principles in refusing a remand on equitable-estoppel issues, nor can Morton invoke them consistent with the supreme court's approach to the case. (*See* Pet. App. 35a.) Here, more than 20 years after the pollution-exclusion clause was approved by the New Jersey De-

II. CONTRARY TO MORTON'S ASSERTIONS, PETITIONERS HAD NO OCCASION OR OPPORTUNITY TO MARSHAL THEIR DEFENSES AGAINST POTENTIAL IMPOSITION OF AN EQUITABLE ESTOPPEL.

According to Morton, petitioners had adequate notice and opportunity to defend themselves because "the New Jersey Supreme Court did not invoke the theory of estoppel '*sua sponte*.' " (Opp. 3.) If this were true (which it is not), Morton would be able to cite specifically to the record to show (1) where Morton or its *amici* proposed that petitioners be equitably estopped from enforcing the pollution-exclusion clause as written, (2) where Morton or its *amici* purported to address the factual prerequisites to imposition of an equitable estoppel, and (3) where petitioners had a fair opportunity to introduce their own proof on those points or to test adverse proof. Morton's vague and tortured discussion of the record below does not even purport to make any of these showings.

First, by falsely characterizing the nature of the holding below (*see* Part I *supra*), the opposition effectively concedes that Morton and its supporting *amici* never urged the theory of equitable estoppel (or the *Harr* case) and never sought to prove the factual prerequisites of an equitable estoppel. Unable to show that there was meaningful notice or opportunity to defend against the equitable-estoppel theory that was ultimately dispositive, Morton has instead scoured the record for any and all appearances of the multi-faceted word "estoppel." (*See* Opp. 3-6, 12-14.)

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partment of Insurance, the supreme court *sua sponte* invalidated the regulatory approval on the basis that state regulators were "misled" in 1970 and "would not readily have understood" the clause. (Pet. App. 35a, 90a.) In other words, the court itself brought into the case issues concerning the mental processes of state regulators, made summary inferences without any evidential basis whatever concerning those mental processes, and simultaneously denied petitioners an opportunity to rebut those inferences.

By Morton's own account, in the entire course of the supreme court briefing, the word "estoppel" cropped up only twice (once in a footnote discussing the West Virginia decision in *Joy Technologies*).[4] In neither instance, however, was the word used in a context remotely suggestive that petitioners were somehow on notice of the possible imposition of an equitable estoppel, and nowhere did Morton or its *amici* purport to demonstrate satisfaction of the doctrine's factual prerequisites—misrepresentation, reasonable reliance, and detriment. If Morton and its *amici* had indeed made equitable-estoppel arguments in this high-profile case (*see* Opp. 2), the briefing on both sides obviously would have been suffused with discussion of equitable-estoppel principles, the *Harr* case, and the prerequisites of misrepresentation, reasonable reliance, and detriment. There was no such briefing because the supreme court's equitable-estoppel ruling came as a bolt out of the blue.[5]

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[4] *See* Opp. 4, 6; Opp. App. 58a-59a, 64a. Morton's opposition relies heavily and misleadingly on the decision of the Supreme Court of West Virginia in *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992). Contrary to Morton's assertions (and the inaccurate brief of one of Morton's *amici*), the *Joy* court did not purport to rest its decision on estoppel doctrine of any stripe. (*Compare* Pet. 17 n.19 *with* Opp. 3-4, 6, 13 & Opp. App. 58a n.37.) More important, *Joy* clearly did *not* purport to apply equitable-estoppel principles and thus made no findings on the questions of misrepresentation, reasonable reliance, and detriment. Thus, neither the *Joy* decision, nor citation to it by Morton's *amici*, served to give petitioners indirect notice that the Supreme Court of New Jersey might *sua sponte* invoke equitable-estoppel principles. Furthermore, contrary to Morton's implications (Opp. 4), Aetna Casualty & Surety Company ("Aetna") first sought leave to file an *amicus* brief well in advance of the June 11, 1992 decision in *Joy*. (*See* Opp. App. 6a.) Indeed, Aetna's motion was granted on May 26, 1992. (Opp. App. 8a.)

[5] Morton's arguments concerning notice (Opp. 3-4, 6-7, 12-14) turn on four submissions to the supreme court: (1) Amended Brief of *Amicus Curiae* New Jersey State League of Municipalities (dated June 24, 1992), (2) Brief *Amici Curiae* of Allied-Signal, Inc., et al. (dated June 19, 1992), (3) Reply Brief of Defendant-Respondents/Cross-Appellants

The gossamer thinness of Morton's assertions concerning notice and opportunity to defend thus serves only to underscore the petitioners' showing that the supreme court invoked the concept of equitable estoppel *sua sponte* in its final decision. In the end, Morton's position is that petitioners were legitimately at risk of any possible adverse outcome on the pollution-exclusion clause, on any theory and on the basis of the supreme court's *de novo* perusal of whatever materials happened to be at hand, simply because petitioners knew that the pollution-exclusion clause was the subject of (unavailing) ambiguity arguments in the case. But the Due Process Clause requires meaningful notice and opportunity to defend, including the opportunity to contradict adverse allegations or evidence. That requirement is not met when factual issues that ultimately prove dispositive are never framed with specificity and litigants therefore have no basis on which to marshal an adequate evidentiary record. *See, e.g., Lankford v. Idaho*, 500 U.S. 110, 120-21 (1991) (due process requires "adequate notice of the critical issue that the [court] was actually debating" as the "bedrock of any constitutionally fair procedure").

It is true, as Morton argues, that the appellate record below was voluminous and that *amici* supporting each side submitted extensive materials concerning the regulatory history at the supreme court level. These materials included a submission by Aetna responding solely to the ambiguity arguments advanced by Morton. (*See* Opp. App. 41a-42a.) As shown in the petition, however, petitioners repeatedly stressed that such materials were *not* a substitute for a full and fair opportunity to create an evi-

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Insurance Company of North America, et al. (dated June 29, 1992), and (4) Brief of *Amicus Curiae* State of New Jersey (dated Oct. 28, 1992). Petitioners therefore have lodged twelve copies of each of these briefs with the Clerk's Office. Review of the briefs will fully confirm that neither Morton nor its supporting *amici* urged imposition of an equitable estoppel on the New Jersey supreme court.

dentiary record. (*See* Pet. 7 & n.8; *see also* Opp. App. 70a-72a, 79a-80a.) More important, Aetna's materials were not directed to the separate issue of equitable estoppel, which neither petitioners nor Aetna knew to be in the case. (*See* note 4 *supra*.) Thus, petitioners' evidence on these issues was not before the supreme court through Aetna's submission, or otherwise.

Morton also argues that the formal opportunity to seek reconsideration was part of the due process supposedly afforded to petitioners. (Opp. 21.) The speciousness of this argument is shown by the fact that the supreme court denied reconsideration without comment even after being presented with 44 affidavits of 1970-era regulators showing beyond dispute that critical facts resolved by the court's summary inferences were sharply disputed and hence that there was no basis for summary resolution of the equitable-estoppel issues by *de novo* appellate fact-finding. Moreover, this Court has held that due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Accordingly, a violation of due process can only be remedied by "wiping the slate clean" and thereby restoring litigants "to the position [they] would have occupied had due process of law been accorded to [them] in the first place." *Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 87 (1988); *see Saunders v. Shaw*, 244 U.S. 317, 319-20 (1917). That requirement is not met by the mere existence of a formal opportunity to apply for discretionary rehearing to a court which gives no indication whatever that it has taken any steps to repair the due process violation.

III. CONTRARY TO MORTON'S ASSERTIONS, THIS IS THE PROPER CASE IN WHICH TO REVIEW THE DUE PROCESS SUFFICIENCY OF THE PROCEDURES BELOW.

Morton concedes this Court's appellate jurisdiction, but asserts that it has been "this Court's practice to decline

review of a case when the party appealing was successful below." (Opp. 10.) However, Morton does not deny that, unless overturned, the decision below will have a significant adverse impact on petitioners and the insurance industry generally. The petition has already shown the basis for this Court's exercising appellate jurisdiction even though petitioners achieved a victory with respect to Morton's specific claims concerning Berry's Creek. (*See* Pet. 10 & n.12.)

Although Morton did not benefit in this particular case, the decision below made equitable-estoppel rulings which Morton can invoke in other cases and which are already being followed by other courts applying New Jersey law. (*See* Pet. 9-10; London Br. 1-4; IELA Br. 4-11.) Moreover, as noted by amicus-movant Insurance Environmental Litigation Association, the Attorney General of New Jersey has recently argued in the *Chemical Leaman* case in the Third Circuit that any due process violation in the *Morton* decision can *only* be corrected by writ of certiorari in this case. (*See* IELA Br. 14 n.23.) Thus, if review is denied here because petitioners prevailed over Morton with respect to Berry's Creek, it is entirely predictable that subsequent litigants (possibly Morton itself) will argue that the due process sufficiency of *Morton* was laid to rest in this case. Plainly, this is the most timely and sharply focused opportunity this Court will have to review the sufficiency of the unfair process by which this devastating decision was reached. Consistent with this Court's tradition of "zeal[] to protect" due process rights in "all types of cases," the due process issues should be reached now. *Greene v. McElroy*, 360 U.S. 474, 497 (1959).[6]

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[6] Morton notes the pendency of a legislative proposal to reform the "Superfund" program. (Opp. 22 n.7.) This observation is not pertinent for many reasons, starting with the fact that the questions presented concern petitioners' due process rights, not issues of environmental or insurance law. Moreover, the proposed legislation would have no impact

CONCLUSION

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Dated: June 16, 1994

Respectfully submitted,

M. ELIZABETH MEDAGLIA
JAMES T. SCHALLER
ROBERT N. KELLY
NICHOLAS P. JELLINS
JACKSON & CAMPBELL
1120 20th Street, N.W.
Suite 300 South
Washington, DC 20036
(202) 457-1600

Attorneys for Petitioner American Home Assurance Company

WILLIAM T. COLEMAN, JR.
Counsel of Record
JOHN L. ALTIERI, JR.
DONALD T. BLISS
PAUL R. KOEPFF
CARL R. SCHENKER, JR.
O'MELVENY & MYERS
555 13th Street, N.W.
Suite 500 West
Washington, DC 20004
(202) 383-5325

Attorneys for Petitioner Insurance Company of North America

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on the large numbers of non-Superfund cases (such as this one) in which policyholders have invoked or will invoke the decision below. Further, while the proposed legislation would provide for the voluntary resolution of some insurance-coverage disputes relating to federal Superfund sites, policyholders would still have the option to continue to litigate. Indeed, they will be more likely to litigate if they can count on decisions like that below which (without due process) deny insurers their contractual defenses. Thus, the New Jersey decision actually undermines the potential efficacy of the legislation, which itself has uncertain prospects for passage.

JAMES KIRK PERRIN
DANIEL P. CASWELL
TERESA ROONEY WILLIAMS
HASKELL & PERRIN
200 West Adams Street
Suite 2600
Chicago, IL 60606
(312) 781-9393

Attorneys for Petitioner
Continental Casualty
Company

JOHN G. ROBERTS, JR.
HOGAN & HARTSON, L.L.P.
Columbia Square Building
555 13th Street, N.W.
13th Floor West Tower
Washington, DC 20004
(202) 637-5810

Attorney for Petitioner
First State Insurance
Company

ELLIOTT ABRUTYN
MORGAN, MELHUISH, MONAGHAN,
ARVIDSON, ABRUTYN & LISOWSKI
651 W. Mount Pleasant Avenue
Livingston, NJ 07039
(201) 994-2500

Attorney for Petitioner
General Accident Insurance
Company of America

JOHN C. SULLIVAN
MANTA AND WELGE
101 Carnegie Center
Suite 215
P.O. Box 5306
Princeton, NJ 08543
(609) 452-8833

Attorney for Petitioner
Liberty Mutual Insurance
Company